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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

**JONES DAIRY FARM,**

*Petitioner,*

vs.

**LOCAL NO. P-1236, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,**

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

Under Section 301 of the Labor Management Relations Act, 1947, should an employer be denied judicial review of a labor arbitration award because such employer participated in the arbitration without making clear its intention to mount a court challenge in event of an adverse decision by the arbitrator?

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*Petitioner,*

**vs.**

**LOCAL NO. P-1236, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,**

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Jones Dairy Farm, by its undersigned attorneys, hereby petitions the United States Supreme Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

Petitioner seeks review of the decision of the United States Court of Appeals for the Seventh Circuit, issued after grant of a motion for rehearing, in Appeal No.

84-1301. The opinion has been published at 760 F.2d 173 (7th Cir. 1985). The first opinion, issued prior to the grant of rehearing, has been published at 755 F.2d 583 (7th Cir. 1985). The opinion of the district court has not appeared in any official or unofficial reporter.

## GROUNDS FOR SUPREME COURT JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1), in that this petition seeks review by writ of certiorari of a decision rendered on judgment entered on April 24, 1985, by a United States Court of Appeals.

## PERTINENT STATUTE

29 U.S.C. §185

§185. Suits by and against labor organizations

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect com-

merce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purpose of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

29 U.S.C.A. §185, pp. 80-81 (1978).

## STATEMENT OF THE CASE

This is a civil action. Petitioner seeks review of a decision by the United States Court of Appeals for the Seventh Circuit reversing an order of the United States District Court for the Western District of Wisconsin which vacated a labor arbitration award.

The district court had jurisdiction of Petitioner's suit to vacate the award pursuant to Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. §185.

The arbitration award in question declared that the subcontracting of certain janitorial work constituted a prohibited midterm modification of a collective bargaining agreement and ordered Petitioner (hereinafter "Employer") to grant back pay to employees laid off as a result of that subcontracting, together with reimbursement to the Respondent (hereinafter "Union") for dues which would have been paid by those employees had they continued to work.[1]

The Employer commenced an action to vacate the award and the Union counterclaimed for enforcement. Upon motions for summary judgment, the district court vacated the award, holding that it did not draw its essence from the collective bargaining agreement and, further, that it was in manifest disregard of the law and contrary to the National Labor Relations Act, as amended, 29 U.S.C. §§151 *et seq.*[2]

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[1] Appendix, pp. 23-35.

[2] Appendix, pp. 17-19. The order of the district court denying reconsideration is also contained in the Appendix at pp. 20-21.

On February 15, 1985, a three-member panel of the Court of Appeals, Judge Posner dissenting, affirmed the district court, holding that the award did not draw its essence from collective bargaining agreement.[3]

The Union filed a petition for rehearing with suggestion for rehearing en banc. On April 24, 1985, the same panel, this time with the opinion written by Judge Posner, unanimously reversed the district court with directions to enforce the award, holding that the Employer should not be permitted to obtain judicial review because it did not either (a) refuse to arbitrate, thereby precipitating a prearbitration judicial determination of its position, or (b) make clear, during the arbitration proceeding, "that it was preserving its challenge for eventual presentation to a court if the arbitrator ruled in the union's favor."[4]

## REASON FOR GRANTING REVIEW

### THE COURT OF APPEALS DECISION IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THE LAW ESTABLISHED BY THIS COURT IN THE *STEELWORKERS TRILOGY*.[5]

Both the district court in its memorandum and the majority of the Court of Appeals panel in their February 15, 1985 opinion held that the arbitration award should

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[3] Appendix, pp. 7-16.

[4] Appendix, pp. 1-6.

[5] *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

be vacated because it failed to draw its essence from the collective bargaining agreement. That is the proper standard of judicial review under Section 301(a) of the Labor Management Relations Act, 1947, as set forth by this Court in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), and reaffirmed in *W.R. Grace & Co. v. United Rubber Workers Local 759*, 461 U.S. 757, 103 S.Ct. 2177, 2182 (1983). Yet in its subsequent opinion issued on April 24, 1985 (hereinafter the "Judge Posner opinion") the panel decided that the Employer should not prevail because it forfeited its right to judicial review. The forfeiture occurred, according to the Judge Posner opinion, because the Employer neglected to do one of two things: it should have refused to arbitrate, leaving it to the Union to commence a judicial proceeding to compel arbitration, or it should have made an express declaration in the arbitration proceedings that it intended to challenge in court any adverse award.

To consider first a refusal to arbitrate, had the Employer embarked on that course it would have run squarely afoul of this Court's directions in *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 567-568 (1960):

> * * * The function of the court [in judging a suit to compel a recalcitrant employer to arbitrate] is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. *It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.* Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

> The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware. (Emphasis supplied.)

The collective bargaining agreement by which the Employer is bound defines a grievance as "any claim against the Company by the Union or by an employee pertaining to this Agreement or incident to the employees relations,"[6] and it goes on to provide that any grievance not settled may be submitted to arbitration.[7] Therefore, under the rationale of *United Steelworkers of America v. American Manufacturing Co.*, any grievance, meritorious or frivolous, which merely *alleges* a violation of the collective bargaining agreement must proceed to arbitration at the Union's request without a prior judicial determination of its validity.

And the grievance which gave rise to this case did indeed allege a violation of the collective bargaining agreement. It is quoted in the arbitrator's award as follows:

> The Union demands that the Company post the bargaining unit job of Janitor. The Union states the Company is in violation of but not limited to Article XI—Seniority and Exhibit B. The Union demands that the Company pay all wages because of the Company's failure to post the job.[8]

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[6] Appendix, p. 36.

[7] Appendix, p. 37.

[8] Appendix, p. 24.

Thus the Union's claim on its face clearly was governed by the agreement and the Employer had no choice but to submit to arbitration.

Turning to the alternative requirement of the Judge Posner opinion, an express declaration at the arbitration that the Employer intended to challenge an adverse award in court, there was no such condition laid down in *United Steelworkers of America v. Enterprise Wheel & Car Corp.* Indeed, how is an employer even to know whether it has an argument that the award fails to draw its essence from the agreement until the award is issued?

If, as the Judge Posner opinion would have it, the *Steelworkers Trilogy* is modified to require an anticipatory declaration of intent to challenge a defective award, a counterproductive complication will be engrafted upon the arbitration process. The initiated will simply develop a boiler plate statement to be read into the record at each arbitration by rote. The uninitiated will be caught in a snare.[9] In neither event will the national labor policy be advanced. To the contrary, it will be artificially burdened.

None of the cases cited by the Judge Posner opinion in support of the anticipatory declaration requirement are really in point.[10] Each deals with a challenge to the juris-

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[9] A review of the appearances listed for the arbitration cases reported in BNA *Labor Arbitration Reports* will show that in many instances the parties, employers as well as unions, are not represented by lawyers.

[10] *Fortune, Alsweet & Eldridge, Inc. v. Daniel,* 724 F.2d 1355, 1357 (9th Cir. 1983); *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union, Local No. 1,* 611 F.2d 580, 584 (5th Cir. 1980); *International Brotherhood of Teamsters, Local Union No. 117 v. Washington Employers, Inc.,* 557 F.2d 1345, 1349-50 (9th Cir. 1977); *Ficek v. Southern Pacific Co.,* 338 F.2d 655, 656-57 (9th Cir. 1964), *cert. denied,* 380 U.S. 988 (1965); *Amicizia Societa Navigazione v. Chilean Nitrate & Iodine Sales Corp.,* 274 F.2d 805, 809 (2d Cir. 1960), *cert. denied,* 363 U.S. 843 (1960).

diction of an arbitrator which was known in advance. The proposition they espouse is that a party cannot participate in an arbitration, await the outcome, and if the award is unfavorable, belatedly challenge the authority of the arbitrator to act.

This is not such a case. The Employer here did not challenge the authority of the arbitrator to act. It could not do so under the *American Manufacturing Co.* decision of this Court. Rather, it challenged the validity of the award which resulted, which it had no way of knowing about before the award was issued and which it was permitted to challenge by the *Enterprise Wheel* decision of this Court.

This case is no different than prior cases in which the Seventh Circuit has vacated or modified arbitration awards because they failed to draw their essence from the applicable agreements. See *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 912 (1985); *Young Radiator Co. v. United Auto Workers, Local 37*, 734 F.2d 321 (7th Cir. 1984); *Milwaukee Typographical Union No. 23 v. Newspapers, Inc.*, 639 F.2d 386 (7th Cir. 1981), *cert. denied*, 454 U.S. 838 (1981). In none of those cases did the court require either a prior refusal to arbitrate or an express reservation of the possibility of subsequent judicial review. Moreover, no case has been found in any other circuit wherein these requirements have been imposed. The instant case represents a new and unwarranted departure from the *Steelworkers Trilogy*, a totally inappropriate, legalistic complication.

## CONCLUSION

For the reasons outlined above, the Employer prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit for the purpose of reviewing the decision of that court in the case herein. In addition, it is suggested that this case may be appropriate for summary deposition on the merits as provided in Rule 23.1 of this Court.

Dated this 16th day of July, 1985.

Respectfully submitted,

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# APPENDIX

# IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. 84-1301

JONES DAIRY FARM,

*Plaintiff-Appellee,*

*v.*

LOCAL NO. P-1236, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,

*Defendant-Appellant.*

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Appeal from the United States District Court
for the Western District of Wisconsin.
No. 83-C-747-S—**John C. Shabaz**, *Judge.*

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ARGUED NOVEMBER 8, 1984—DECIDED APRIL 24, 1985

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Before WOOD and POSNER, *Circuit Judges*, and DUMBAULD, *Senior District Judge.**

POSNER, *Circuit Judge.* The collective bargaining agreement between Jones Dairy Farm and a local of the food workers union contained the following clause: "With respect to the subcontracting of work, and the performance of work at this plant rather than elsewhere, each party retains its legal rights as in effect prior to the execution of this Agreement, and nothing in this Agreement shall be construed as adding to or subtracting from those

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* Hon. Edward Dumbauld of the Western District of Pennsylvania, sitting by designation.

rights." Jones Dairy Farm wanted to contract out some janitorial work currently being performed at the plant by employees represented by the union; and after giving the union notice and an opportunity to bargain over the question, Jones Dairy Farm went ahead and contracted out the work. The union filed a grievance. The arbitrator interpreted the collective bargaining agreement to forbid the company to contract out the work, and the company brought this suit under 29 U.S.C. § 185 to set aside the arbitration award. The district court set it aside, the union appealed, and in a split decision this panel affirmed the district court. 755 F.2d 583 (7th Cir. 1985). The company has petitioned for rehearing.

The arbitrator's decision in favor of the union was based on his interpretation of a decision by the National Labor Relations Board, *Milwaukee Spring Division*, 265 N.L.R.B. 206 (1982), which was repudiated by the Board on reconsideration. *Milwaukee Spring Division*, 268 N.L.R.B. 601 (1984). Our previous opinions revolved around the question whether and how grievously the arbitrator had erred in deciding a legal question (the parties' "legal rights . . . in effect prior to the execution of this Agreement") and whether such error made the arbitrator's award unenforceable. We now think the appeal should be decided differently, and vacate our previous decision.

The company's basic argument is that the intention of the contracting-out clause was to give it a legal right to contract out any work now performed at the plant, and that the arbitrator had no authority to interpret the clause as giving the union a right to prevent contracting out. The arbitration clause of the collective bargaining agreement states that "the sole function of the arbitrator shall be to determine whether or not the rights of an employee, as set forth in this Agreement, have been violated by the Company. The arbitrator shall have no authority to add to, subtract from, or modify this Agreement in any way." This does appear to put beyond the arbitrator's power the determination of rights not conferred by the agreement itself. And the first *Milwaukee Spring* decision, on

which the arbitrator relied, seems irrelevant. It was a case where the collective bargaining agreement said nothing about contracting out, so that the issue was the parties' rights when the agreement is silent—not, as in this case, when a clause in the agreement appears to make contracting out a prerogative of management.

But we do not understand therefore why the company consented to arbitrate this dispute. If it is right, there is no basis in the contracting-out clause, the arbitration clause, or anything else in the collective bargaining agreement for arbitrating this dispute. Cf. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-85 (1960). It is as if the union had said, we want the arbitrator to decide whether the president of Jones Dairy Farm should be allowed to use a nondairy creamer in his coffee.

The company could therefore have refused to arbitrate; and if the union had sued it, the court would have decided whether the company had to arbitrate this particular dispute—at least if the question could be answered without entangling the court in the merits of the dispute sought to be arbitrated. This qualification is taken very seriously in this circuit, see, e.g., *Communications Workers v. Western Elec. Co.*, 751 F.2d 203, 205-07 (7th Cir. 1984), and maybe would come into play here, as hinted in *Associated Milk Dealers, Inc. v. Milk Drivers Union, Local 753*, 422 F.2d 546, 552 (7th Cir. 1970). It is desirable to put as much of the case as possible to the arbitrator, and not encourage parties to go to court before the arbitration can begin. But that is not an issue we need decide. If the question of arbitrability was itself arbitrable, all that would mean is that it would have to be presented to the arbitrator. It would still be an issue. But Jones Dairy Farm did not make it an issue. It did not, while agreeing to participate in the arbitration, challenge the arbitrator's jurisdiction, and make clear that it was preserving its challenge for eventual presentation to a court if the arbitrator ruled in the union's favor, as in *Wilkes-Barre Publishing Co. v. Newspapers Guild of Wilkes-*

*Barre, Local 120*, 647 F.2d 372, 382 (3d Cir. 1981). See Gorman, Basic Text on Labor Law 587 (1976). The company never questioned the arbitrator's authority.

If a party voluntarily and unreservedly submits an issue to arbitration, he cannot later argue that the arbitrator had no authority to resolve it. *Fortune, Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1357 (9th Cir. 1983) (per curiam); *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union, Local No. 1*, 611 F.2d 580, 584 (5th Cir. 1980); *International Brotherhood of Teamsters, Local Union No. 117 v. Washington Employers, Inc.*, 557 F.2d 1345, 1349-50 (9th Cir. 1977); *Ficek v. Southern Pacific Co.*, 338 F.2d 655, 656-57 (9th Cir. 1964); *Amicizia Societa Navigazione v. Chilean Nitrate & Iodine Sa[illegible] Corp.*, 274 F.2d 805, 809 (2d Cir. 1960). It makes no difference whether it is an issue of law. *Broadway Cab Coop., Inc. v. Teamsters Local Union No. 281*, 710 F.2d 1379, 1382 (9th Cir. 1983). By going forward with the arbitration without questioning the arbitrator's authority to resolve the dispute, Jones Dairy Farm consented to have him decide what "legal rights" in the contracting-out clause meant.

Collective bargaining agreements often incorporate legal terms which it then becomes the duty of the arbitrator to interpret, and courts treat those interpretations deferentially. See, e.g., *id.; Local Union 59, Int'l Brotherhood of Electrical Workers v. Green Corp.*, 725 F.2d 264, 268-69 (5th Cir. 1984); *American Federation of Television & Radio Artists, Cleveland Local (AFTRA) v. Storer Broadcasting Co.*, 745 F.2d 392, 398-99 (6th Cir. 1984). If people want a question of law resolved by an arbitrator rather than a judge, there is nothing to stop them. It would be odd if having consented to have the arbitrator decide what its legal rights to contract out work were, Jones Dairy Farm could then have the same question redetermined by two courts—the district court and this court. We hold it could not, and therefore that the judgment must be reversed with instructions to enforce the arbitrator's

award. Of course, if the arbitrator, having been invited by the parties to determine what Jones Dairy Farms legal rights were, disregarded the law, and based his decision on some private notion of equity, the courts could set aside the award. See *id.*; *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801-02 (9th Cir. 1961). But the arbitrator in this case did not do any such thing; he applied what he thought was the law, as given by the first *Milwaukee Spring* decision. Since Jones Dairy Farm, by submitting without a peep to the arbitrator's jurisdiction, admitted the competence of the arbitrator to determine its "legal rights," it cannot complain that the arbitrator exceeded his authority by determining them. Of course the arbitrator may have made a mistake in the course of exercising that authority; but we have found no case where an arbitrator's award was set aside just because he had made a legal error.

Some cases, it is true, such as *AFTRA*, *supra*, 745 F.2d at 398, leave open the question whether an error in deciding a pure question of law might not be grounds for setting aside the arbitrator's award. The arbitrator's comparative advantage is least (and the court's greatest) when the arbitrator is addressing a pure question of law; and if parties cannot get judicial review of such questions, maybe they will be deterred from agreeing to arbitration. Against these points must be set the delay and the extra layers of review (since an arbitrator's decision is reviewable both by the district court asked to enforce or set aside his award and the court of appeals asked to vacate the district court's decision), not to mention the difficulty of distinguishing "pure" from "impure" questions of law, created by embracing the suggested distinction. But we need not weigh these considerations here, as the question of the company's preexisting legal rights was not a pure question of law, but involved or could have involved the terms of the collective bargaining contract, the parties' practices under it, the precise nature of the work sought to be contracted out, and the reasons for contract-

ing it out. We also need not decide whether a reviewing court can correct a clear (as distinct from a pure) error of law made by an arbitrator. The company lays great stress on the fact that the Board has repudiated the *Milwaukee Spring* decision on which the arbitrator relied and that anyway that decision may have been inconsistent with our own previous decision in *University of Chicago v. NLRB*, 514 F.2d 942, 948-49 (7th Cir. 1975). But the arbitrator cannot be seriously faulted either for failing to predict the Board's change of heart or for refusing to be bound (as the Board itself refuses to be bound) by circuit precedent. He may well have erred; but we cannot say he committed so gross an error that it would warrant setting aside his award, assuming that the law of labor arbitration has a doctrine of gross error.

The district court should not have set aside the arbitrator's award, so we reverse, and remand with directions to enforce the award.

REVERSED.

# IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. 84-1301

JONES DAIRY FARM,

*Plaintiff-Appellee,*

*v.*

LOCAL NO. P-1236, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,

*Defendant-Appellant.*

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Appeal from the Judgment of the United States District Court for the Western District of Wisconsin

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ARGUED NOVEMBER 8, 1984—DECIDED FEBRUARY 15, 1985

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Before WOOD and POSNER, *Circuit Judges*, and DUMBAULD,* *Senior District Judge.*

DUMBAULD, *Senior District Judge.* There is a strong policy, the classical formulation of which is to be found in the *Steelworkers' Trilogy*[1], that by stipulating for arbi-

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* The Honorable Edward Dumbauld, Senior District Judge, of the Western District of Pennsylvania, sitting by designation.

[1] *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 568 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co., Corp.*, 363 U.S. 574, 582-83 (1960); *United Steelworkers v. Enterprise Corp.*, 363, 593, 596-97 (1960).

tration under a collective bargaining agreement the parties are entitled to the arbitrator's judgment regarding matters submitted for determination, which is more apt to be imbued with the atmosphere and flavor of the workplace than the academic ivory-tower pronouncements of a court. Hence the courts should be slow to interfere with the settlement procedure which the parties have bargained for.

But this rule applies only when and where the arbitrator is acting pursuant to the agreement embodying what the parties have accepted by their *consensus ad idem.* Hence if the arbitrator acts *ultra vires* or goes beyond the scope delegated to him by the agreement of the parties, a court may properly set aside such an *excès de pouvoir.*

The line is best drawn by the language of the Supreme Court in *Enterprise* (363 U.S. at 597) that the arbitrator's award "is legitimate only so long as it draws its essence from the collective bargaining agreement."

What did the agreement in the case at bar provide, and what did the arbitrator do?

With regard to the disputed issue of contracting out the janitorial work formerly performed by appellant union, the contract expressly provided that nothing was stipulated in that regard but that the status quo should be preserved:

> "With respect to the subcontracting of work, and the performance of work at this plant rather than elsewhere, each party retains its legal rights as in effect prior to the execution of this Agreement, and nothing in this Agreement shall be construed as adding to or subtracting from those rights." [2]

In other words, both parties reserve their rights under existing law. They are to enjoy no more and no less than they would if the collective bargaining agreement did not exist.

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[2] Article V, sec. 1.

And under existing law, in the absence of agreement to the contrary, the employer remains free to contract out if he so desires, even if the motivation for the decision is a wish to pay lower labor costs. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 106 (1970); *University of Chicago v. NLRB*, 514 F.2d 942, 948-49 (7th Cir. 1975).

But the arbitrator followed a contrary doctrine embodied in *Milwaukee Spring Division of Illinois Coil Spring Co.*, 265 N.L.R.B. No. 28 (1982) which was then on appeal, and subsequently was repudiated by the Board upon reconsideration. *Milwaukee Spring Division of Illinois Coil Spring Co.*, 268 N.L.R.B. No. 87 (1984).

Hence it cannot be said that the arbitrator's award "draws its essence from the collective bargaining agreement." (363 U.S. at 597, *supra.*). The agreement has no impact upon the issue in dispute. The arbitrator is simply expressing his opinion on a legal question, and courts (the bearers of expertise in such matters) are free to correct a mere mistake of law, as done by the District Court in its judgment setting aside and vacating the award.

The judgment of the District Court is

AFFIRMED.

POSNER, *Circuit Judge*, dissenting. Jones Dairy Farm agreed to arbitrate its dispute with the food-workers union over the contracting out of work, and the arbitrator interpreted the contract to forbid contracting out. The fact that in doing so the arbitrator may have made a mistake, even a mistake of law, is not a ground for setting aside his award. We should therefore reverse the district court.

If a labor arbitrator makes an award that is based on his interpretation of the collective bargaining contract (that "draws its essence from" the contract, in the accepted metaphor, see *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984); *Local Union 59, Int'l Brother-*

*hood of Electrical Workers v. Green Corp.*, 725 F.2d 264, 269 (5th Cir. 1984)), a court may not set aside the award even if based on a clear misinterpretation of the contract. Having found that the contract between Jones Dairy Farm and the food-workers union expressly reserved to the former its preexisting legal rights concerning the contracting out of work, the arbitrator proceeded to determine what those rights were and concluded that they did not in fact authorize contracting out. In so concluding the arbitrator was necessarily looking outside of the contract, to the right of contracting out when a collective bargaining contract does not regulate the practice. But he was looking out because the contract told him to look out. The contract made the external law on the question a part of the contract.

When he looked outside, he made an analytical mistake. He thought that the Labor Board's first *Milwaukee Spring* decision, *Milwaukee Spring Division of Illinois Coil Spring Co.*, 265 N.L.R.B. 206 (1982), which had established the principle that an employer who has a collective bargaining agreement cannot contract out work unless the agreement contains a clause permitting it, required him to conclude that Jones Dairy Farm could not contract out the work in question. We had seemingly held to the contrary of *Milwaukee Spring* in *University of Chicago v. NLRB*, 514 F.2d 942, 948-49 (7th Cir. 1975), although the case may be distinguishable, and in any event I am not certain (and do not have to decide) that an arbitrator must follow circuit precedent that is contrary to Labor Board precedent. The Board is not bound by circuit precedent; maybe an arbitrator shouldn't be either. Nor do I think the arbitrator can be said to have made a mistake of law just because, *after* the arbitration award was handed down, the Labor Board repudiated the principle of its first *Milwaukee Spring* decision, in its second one, 268 N.L.R.B. No. 87, 115 L.R.R.M. 1065 (1984). The arbitrator's mistake lies in his interpretation of the first *Milwaukee Spring* decision. The Board there had interpreted the National Labor Relations Act to mean

that an employer who is bound by a collective bargaining agreement may not shift work to another plant (or, presumably, contract out work) *unless the agreement authorizes him to do so.* See 265 N.L.R.B. at 210. As the agreement in that case was silent on the matter, the qualification did not come into play. But the agreement in this case is not silent on contracting out. It says or at least seems to say that there is no *contractual* limitation on the employer's right to contract out, that any limitations on that right must be found in the external law, which to the arbitrator meant, in the first *Milwaukee Spring* decision. But that decision was intended to state the rule for cases where the collective bargaining agreement does not waive the union's right to object to contracting out. The question in this case is whether the union waived that right by agreeing to the contracting-out clause. The arbitrator read *Milwaukee Spring* too broadly in thinking that it decides this case. He should have asked whether the clause in the collective bargaining agreement in this case was intended to give Jones Dairy Farm an absolute right to contract out, which would be permissible under *Milwaukee Spring,* or whether it merely incorporated current Board doctrine, whatever that might be, on collective bargaining agreements that are silent on the matter of contracting out. He did not ask the right question, and it is impossible to say therefore whether he came up with the right answer.

Maybe, indeed, he did something worse than misread a legal decision—maybe he forgot that his job was to interpret the contract. In a sense he looked through rather than at the contracting-out clause. Instead of asking what light it cast on the parties' intent to permit or forbid the employer to contract out work, he asked what the Board's policy on the matter was as evidenced by *Milwaukee Spring.* But I do not think it would be right to conclude that his award does not "draw its essence" from the contract. The arbitrator looked at the clause first, determined that it required him to look at *Milwaukee Spring,* and then interpreted that case too broadly. The

contract told him to make a legal determination, and he did that, but he did it wrong.

It might seem that we should be able to correct such a mistake, since it is a mistake of law. One reason for the extraordinary judicial deference to decisions of labor arbitrators is that arbitrators are specialists in interpreting labor contracts. See, e.g., *Enterprise Wheel & Car Corp. v. United Steelworkers, supra,* 363 U.S. at 596. There is no real issue of contract interpretation in this case as the arbitrator decided it; the only issue is the meaning of a decision of the Labor Board, an issue on which courts have the comparative advantage rather than arbitrators. This case rests uneasily in a middle area between an arbitration award based on a reading of the language of the contract—an award that clearly is enforceable—and an award based on the arbitrator's personal notions of justice—an award that clearly is unenforceable. We could say it was closer to the second than to the first pole if the only reason for the deference given the decisions of labor arbitrators were their comparative advantage over judges in interpreting collective bargaining contracts. But it is not. If it were, courts would not hesitate to set aside any arbitration award that was infected with a legal error and send the case back to the arbitrator for reconsideration under the correct legal standard. They do not; at least they did not until today. The principle that courts will defer even to the legal determinations of labor arbitrators is established in a long line of cases, none of which my brethren cite. See, e.g., *Anaconda Co. v. District Lodge No. 27 of Int'l Ass'n of Machinists,* 693 F.2d 35, 37-38 (6th Cir. 1982) (per curiam); *Local Union 59, Int'l Brotherhood of Electrical Workers v. Green Corp., supra,* 725 F.2d at 268-69; *American Federation of Television & Radio Artists, Cleveland Local (AFTRA) v. Storer Broadcasting Co.,* 745 F.2d 392, 398 (6th Cir. 1984).

The most important reason for deference to labor arbitrators is that labor disputes ought to be resolved rapidly; and, to be fast, arbitration must be final. Its finality is seriously compromised if an error of law by the arbi-

trator is grounds for requiring the arbitrator to start over. Of course haste makes for error. But this is just to say that there is a tradeoff between celerity and accuracy. If an employer doesn't like the way arbitration strikes the tradeoff he needn't agree to an arbitration clause. The arbitrator's award in this case should be enforced.

It is true, though unremarked by my brethren, that many cases describe a "manifest disregard of the law" by the arbitrator as a ground for setting aside his award. E.g., *Anaconda Co. v. District Lodge No. 27 of Int'l Association of Machinists, supra*, 693 F.2d at 37-38; *Alhambra Foundry Co. v. General Warehousemen's Union, Local 598*, 687 F.2d 287, 290 (9th Cir. 1982). The source of this idea, which stands in uneasy contrast to the apparently well-settled principle that the arbitrator's legal errors are not reviewable, is language in a decision by the Supreme Court that did not involve labor arbitration: "the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953). Unfortunately the Court did not define "manifest disregard," and the context does not illuminate it. One interpretation, which is consistent with the fundamental principle of deference to awards that "draw their essence" from the collective bargaining contract, is that manifest disregard "might be present when arbitrators understand and correctly state the law, but proceed to disregard the same" in favor of their private notions of justice. *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961). An alternative interpretation more helpful to my brethren (though unmentioned by them) is that manifest disregard means "clearly contrary to the law." Although this interpretation was followed in *American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280, 1284-85 (9th Cir. 1982), on the basis of an inaccurate citation to *San Martine* (see also *George Day Construction Co. v. United Brotherhood of Carpenters, Local 354*, 722 F.2d 1471, 1480 (9th Cir.

1984)), no appellate court has actually set aside a labor arbitrator's award on this ground, as distinct from doing so because the award required the parties to do something in violation of a statute such as the National Labor Relations Act (another sense of "manifest disregard of the law"), or injured nonparties, or was otherwise against public policy. See, e.g., *Local No. P-1236, Amalgamated Meat Cutters v. Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982); *Broadway Cab Cooperative, Inc. v. Teamsters Local Union No. 281*, 710 F.2d 1379 (9th Cir. 1983). Nothing of the sort is involved here. Jones Dairy Farm may or may not have agreed to restrict its freedom of action to contract out work, but no one suggests that if it did, as the arbitrator held it did, the result is illegal, unfair to third parties, or otherwise contrary to public policy. There may be no legal limitation on contracting out in the circumstances presented by this case but there is no legal duty to contract out that the award might have violated.

Any broader interpretation of "manifest disregard of the law" rests primarily though tenuously on inference from cases which suggest that the arbitrator's competence is to interpret collective bargaining contracts rather than statutes, or that an arbitrator's errors of law are not correctable if entwined with a factual determination (implying that pure errors of law might be), or that a mere error in interpreting or applying law is not a manifest disregard of law (implying that a clear error might be). See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53-54 (1974); *American Federation of Television & Radio Artists, Cleveland Local v. Storer Broadcasting Co., supra*, 745 F.2d at 398; *Anaconda Co. v. District Lodge No. 27 of Int'l Ass'n of Machinists, supra*, 693 F.2d at 37-38; *General Tel. Co. v. Locals 1635, 1636 & 1637, AFL-CIO*, 427 F. Supp. 398, 399 (W.D. Pa. 1977). But I have found only three cases that are like this one, and two are clearly inconsistent with our action today. In *Local Union 59, Int'l Brotherhood of Electrical Workers v. Green Corp., supra*, where the company challenged an arbitra-

tion award on the ground that the arbitrator had misunderstood the meaning of "alter ego" in corporation law, the court rejected this challenge, sensibly not distinguishing between pure and mixed questions of law, see 725 F.2d at 268-69—a distinction whose meaning as well as utility is obscure in the present context. In the *Storer Broadcasting* case, *supra*, where the collective bargaining contract excluded from recognition "supervisors as defined in the National Labor Relations Act as amended," 745 F.2d at 395, the court of appeals deferred to the arbitrator's interpretation of "supervisors" without undertaking its own analysis of whether he was correct—and held that the district court should not have made its own determination of the correctness of the arbitrator's interpretation. See *id.* at 398-99. However, *General Teamsters Local 162 v. Mitchell Bros. Truck Lines*, 682 F.2d 763, 766-67 (9th Cir. 1982), can be read, though with difficulty, to imply that if the arbitrator's error of law in following an overruled case had been material, the award would have been set aside. This is the strongest precedent for what this court does today; it isn't much.

And even if there is enough play in the precedents to permit us to innovate, it would only be to the extent of allowing the arbitrator's award to be set aside for a clear legal error—a qualification I do not find in my brethren's opinion and one in any event not applicable to this case, where the arbitrator's error was subtle rather than clear. But even as so qualified, my brethren's innovation is one we do not need. By agreeing to submit this dispute to arbitration, Jones Dairy Farm has admitted that its right to contract out is arbitrable and that the arbitrator is therefore empowered to determine the parties' rights under external law, see *International Brotherhood of Teamsters, Local Union No. 117 v. Washington Employers, Inc.*, 557 F.2d 1345, 1350 (9th Cir. 1977); Gorman, Basic Text on Labor Law 586-87 (1976), subject to the usual extremely limited judicial review. When the arbitrator does this he is interpreting the contract and his interpretation is entitled to the usual deference. Contracts are

never self-contained; at the very least the dictionary is implicitly incorporated. They often use words that have a legal meaning, and by doing so incorporate external law; the cases cited earlier—cases that my brethren pass over in silence (*Anaconda*, *Green*, and *Storer*)—hold that an arbitration award is not vulnerable merely because the arbitrator got that legal meaning wrong. If Jones Dairy Farm had wanted to protect itself from the risk of the arbitrator's making a legal mistake—had wanted to have the usual judicial safeguards, which include plenary review of legal rulings made by the trial court—it should not have agreed to make the contracting-out clause arbitrable.

By affirming the district court without even citing the many cases that restrict the power of the courts to correct legal errors made by labor arbitrators, and without even confining its holding to clear errors, the decision today makes judicial review of labor arbitration uncertain, may encourage employers to resist enforcement of labor arbitration awards, and portends a most unwelcome expansion of the federal courts' properly modest role in the labor field. The district court's judgment should be reversed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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No. 83-C-747-S

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No. 84-1301

JONES DAIRY FARM,

*Plaintiff,*

*v.*

LOCAL NO. P-1236, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,

*Defendant.*

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## MEMORANDUM AND ORDER

This is an action commenced by Jones Dairy Farm (hereinafter "Company") against Local No. P-1236, United Food and Commercial Workers International Union, AFL-CIO (hereinafter "Union") to set aside and vacate an arbitrator's award.

The proposed findings of fact as submitted by the Union are agreed to by the Company in their entirety and are accordingly the facts as found by this Court. The Court further finds as follows:

The award issued by Arbitrator Flagler recognized in its legal and contractual analysis:

> Unless and until the court of competent jurisdiction so rules, *Milwaukee Spring* represents the definitive statement of law which the parties agreed would govern their subcontracting dispute.

On January 23, 1984 at Washington, D.C. the National Labor Relations Board (NLRB) having had the case re-

manded upon its motion to the Court of Appeals for the Seventh Circuit, reversed its original decision and order in *Milwaukee Spring Division and Illinois Coil Spring Company and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 547*, 265 NLRB Number 28 (1982). The previous decision now reversed had represented the principle that an employer must obtain the Union's consent before implementing changes on matters "not contained in" the body of the Collective Bargaining Agreement.

## MEMORANDUM AND CONCLUSIONS OF LAW

The company has argued that the *Milwaukee Spring* 1 test ought not be applied because it is an invalid legal construction which will be reversed by the federal courts.

In light of *University of Chicago v. NLRB*, 514 F.2d 942 (7th Cir. 1975), this Court had believed that not only the arbitrator, but the Union as well would have agreed with the Company's position and perhaps found some other theory upon which to advocate the Union's position.

> As we read the cases, unless transfers are specifically prohibited by the bargaining agreement, an employer is free to transfer work out of the bargaining unit if: (1) the employer complies with *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964), by bargaining in good faith to impasse; and (2) the employer is not motivated by anti-union animus. *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 85 S.Ct. 994, 13 L.Ed.2d 827 (1965). The Board concedes that the University bargained in good faith with Local 321 in advance of its decision to transfer the work. Furthermore there is no contention and certainly no evidence that the University's decision to transfer the work was motivated by anti-union animus.

*University of Chicago v. NLRB*, supra.

The award of the arbitrator which this Court is asked to set aside and vacate contains the following:

> The arbitrator, however, lacks authority to consider this argument. Only the reviewing court has the power to rule on the question.

The NLRB has now reversed itself and the decision of the arbitrator must be examined in regard to the law which presently exists. As correctly stated in the award, the sole question before the arbitrator is whether the controlling agreement permits the transfer of work out of the unit without express or implied union consent.

As in *Chicago*, there is no suggestion that the parties to the proceeding failed in any way to bargain in good faith in advance of the Company's decision to subcontract. There is no contention or evidence that the Company's decision to subcontract was motivated by anti-union animus.

The bargaining agreement does not prohibit the subcontracting of work, and, accordingly, consent of the Union is not required.

This Court must conclude that the May 25, 1983 arbitrator's award issued by Arbitrator Flagler does not draw its essence from the Collective Bargaining Agreement previously entered into between the parties.

Further, the award is in manifest disregard of the law and contrary to the National Labor Relations Act and those decisions of the Board implementing provisions of the Act.

Accordingly,

ORDER

IT IS ORDERED that judgment is entered in favor of the plaintiff Company and against the defendant Union setting aside and vacating the award of the arbitrator, together with costs.

Entered this 31st day of January, 1984.

BY THE COURT:

/s/ JOHN C. SHABAZ
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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No. 83-C-747-S

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JONES DAIRY FARM,

*Plaintiff,*

*v.*

LOCAL NO. P-1236, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,

*Defendant.*

---

ORDER

On January 31, 1984 judgment was entered in favor of the plaintiff setting aside and vacating the arbitrator's award. The defendant has now moved the Court to reconsider its decision and that judgment previously entered. The motion is denied.

The decision which has been submitted for the Court's review, *Day Constr. Co. v. Carpenters Local 354*, ____ F.2d ____, 115 LRRM 2459 (9th Cir. 1984), is unremarkable, and provides no additional support for the defendant's position.

This Court is of the opinion that where the arbitrator contradicted an explicit mandate of the Court of Appeals for the Seventh Circuit (*University of Chicago v. NLRB*, 514 F.2d 942 (7th Cir. 1975)) as occurred here, and upon reliance of *Milwaukee Spring I* applies a legal standard which is contrary to law and public policy, deference to the arbitrator's decision is, indeed, unwarranted.

Where the consent to arbitrate is freely given, this does not in any way require this or any other Court to uphold an award which violates either the law or a long-standing, explicit, well-defined and dominant public policy.

Accordingly,

ORDER

IT IS ORDERED that defendant's motion for reconsideration is DENIED.

Entered this 15th day of February, 1984.

BY THE COURT:

/s/ JOHN C. SHABAZ
District Judge

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 24, 1985.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. EDWARD DUMBAULD, *Senior District Judge**

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JONES DAIRY FARM,

*Plaintiff-Appellee,*

No. 84-1301 vs.

LOCAL NO. P-1236, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,

*Defendant-Appellant.*

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Appeal from the United States
District Court for the Western District of Wisconsin.
No. 83 C 747—Judge John C. Shabaz

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This cause was heard on the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and REMANDED with directions, in accordance with the opinion of this Court filed this date.

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* The Honorable Edward Dumbauld of the Western District of Pennsylvania, is sitting by designation.

IN THE MATTER OF ARBITRATION
BETWEEN
JONES DAIRY FARM
AND
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL P-1236

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FMCS Case No. 82K/16471

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The hearing was held at Jones Dairy Farm, Fort Atkinson, Wisconsin, on February 23, 1983, at 9:30 a.m., before John J. Flagler, who was appointed by the Federal Mediation and Conciliation Service.

APPEARANCES

| *Company* | *Union* |
|---|---|
| Herbert P. Wiedemann, Attorney | Kenneth R. Loebel, Attorney |
| Willard Lenton, Vice President of Manufacturing | William M. Roberts, President |

ISSUE

Under the collective bargaining agreement between the parties dated October 1, 1979, what disposition should be made of the grievance of William Roberts dated February 11, 1982?

BACKGROUND

This arbitration, between Jones Dairy Farm and United Food and Commercial Workers International Union, AFL-CIO, and its local No. P.1236 arises under the collective bargaining agreement between the parties dated October 1, 1979.

The case involves the subcontracting of janitorial work. The Company notified the Union of its decision to subcontract on February 3, 1982. A grievance protesting the Company's action was presented verbally on February 5, 1982 and reduced to writing on February 11, 1982. The written statement of the grievance is as follows:

> The Union demands that the Company post the bargaining unit job of Janitor. The Union states the Company is in violation of but not limited to Article XI—Seniority and Exhibit B. The Union demands that the Company pay all wages because of the Company's failure to post the job.

The Company's Step 3 response to the grievance, dated March 31, 1982, reads as follows:

> Apparently this grievance is mis-dated.
>
> The Company denies the Union's third step grievance dated *2/11/81* pertaining to the janitor's job.
>
> There is no obligation on the part of the Company to post a vacancy unless the Company decides to fill it. The Company decided not to fill the janitor function and instead contracted it out.
>
> No contractual violation, grievance denied.

### Applicable Contract Language

The labor contract provides a Recognition and Management Clause, Union Security, Seniority with Job Posting, and Arbitration. The subcontracting provision states:

> With respect to the subcontracting of work, and the performance of work at this plant *rather than elsewhere*, each party retains its legal rights as in effect prior to the execution of this Agreement, and nothing in this Agreement shall be construed as adding to or subtracting from those rights . . ."

POSITION OF THE UNION

1. The phrase ". . . performance of work at this plant rather than elsewhere," in the context of bargaining history, specifically restricts the janitorial subcontracting.
2. The Recognition clause and the listing of the janitors' job title in the Agreement's wage schedule and classification section shows intent to continue the work within the bargaining unit.
3. The Job Posting provision requires the work to be bid among covered employees if a vacancy occurs. When the senior worker retired, the job should have been posted.
4. Past practice clearly establishes the work as within bargaining unit coverage and, further, shows that subcontracting requires Union consent as in the case of security guards.
5. The Agreement controls the time frame for the legal rights of the parties, and this does not refer to the period before 1967 but rather the term of agreement set forth in the duration clause.
   a. This means that the *Milwaukee Spring* decision of NLRB covers the dispute.
   b. *Milwaukee Spring* clearly prohibits the type of subcontracting subject to these proceedings.
6. Liability, i.e., remedy is not restricted by the terms of the Agreement but rather is required by law, contract, and arbitral authority.

POSITION OF THE COMPANY

1. The Union has failed in past efforts to restrict subcontracting authority.
2. The legal rights of the parties was established in the time prior to the 1967 Agreement. The law that governs, therefore, is contained in the *Fibreboard* decision and its progeny.

3. The Company has completely satisfied its *Fibreboard* obligations and following bargaining impasse on the issue, was free to implement the subcontracting.

4. The subcontracting was for good and useful business reasons and not to escape contractual obligations or to discriminate against union employees.

   a. The decision was prompted by a loss in efficiency on the part of bargaining unit employees, and by the lower wage costs of subcontracting the work.

5. *Milwaukee Spring* should not be applied because:

   a. It is invalid, erroneous law and will be reversed in the federal courts.

   b. The correct statement of law is contained in the Ninth Circuit's decision in *Brown Co.* which contradicts the construction expressed in *Milwaukee Spring*.

6. Even if Milwaukee Spring were applied, the Company meets the test of contractual permission to subcontract the work in question.

## Discussion

The specific provision governing the present dispute appears in Article V, Section 1:

> "With respect to the subcontracting of work, and the performance of work at this plant rather than elsewhere, each party retains its legal rights as in effect prior to the execution of this Agreement."

The correct interpretation of this provision assumes that the parties choose purposefully the terms to capture their mutual intent and purpose. The assumption extends to the belief that the parties' drafted their agreement with attention to elementary rules of grammatical construction. The meaning of the subcontracting provision, therefore, can be readily discerned from a simple parsing of the sentence structure.

The parsing of the sentence reveals that there are two circumstances to be governed by the parties' ". . . legal rights as in effect prior to the execution of this Agreement." These two circumstances are stated in the conjunctive ". . . subcontracting of work, and the performance of work at this plant rather than elsewhere . . ." By virtue of the conjunctive mode the sentence necessarily means that each and both of these circumstances are subject to whatever rules of law apply during the life of the Agreement.

In sum, the provision effectively reflects the negotiating impasse on this broad issue which continued throughout the life of the parties' collective bargaining relationship. Bargaining history reveals that the Union failed to negotiate its 1966 proposal to bar all subcontracting "performed either on or off the Company premises." In essence, Article V, Section 1 says that, having failed to agree on any contractual limitations or expansion of the Employer's right to subcontract, the parties merely agreed to stand pat on their legal rights in this regard.

The question, therefore, reduces to a determination of what were the legal rights of the parties "in effect prior to the execution of this Agreement." The short answer is the right to have subcontracting issue be governed by the evolving body of law issuing from the NLRB and courts of competent jurisdiction. In this regard the Union is correct in arguing that the provision cannot be read as freezing the rules of law as they existed prior to the 1967 Agreement.

Surely, the parties could not have intended to posture themselves as an oasis, isolated from the dynamic evolution of tribunal law and judicial decisions in such a complex area of labor relations. If the parties had meant to bind themselves to some fixed stage in such an unsettled area of law, they could have codified in the contract the basic legal rules as they existed at any particular point in time. They chose not to do this. Rather, the parties merely agreed to be bound by the applicable law for the duration of the labor contract.

In sum, all the agreement ever encompassed was access to arbitration for disputes over subcontracting, rather than to the NLRB as the forum of first impression. The very contractual mention of the subject matter provides this result. Access to arbitration also forecloses resort to strike or lock out as means of settling any such disputes.

The language of Article V, Section 1 has an additional purpose. It constrains the arbitrator to respect and apply rules of tribunal law and judicial decisions applicable to the particular dispute. Accordingly, this present review looks to case law on point to find the correct answer to the stipulated issue.

## Discussion of Law

The earliest legal principle applicable to the present dispute was established by the U.S. Supreme Court in Fibreboard v. NLRB, 379 U.S. 203 (1964). The fact situation in *Fibreboard* was quite similar in all material aspects to those here in review. The employer decided to replace employees in the bargaining unit with an independent janitorial contractor. The Supreme Court affirmed a board determination that the removal of such work constituted a mandatory subject of bargaining.

The *Fibreboard* principle fathered a line of tribunal and judicial decisions which hold that an employer must give advance notice of intent to subcontract work currently being performed by bargaining unit personnel, and to bargain over both the decision and its effects before acting on the decision, if the union invokes a challenge. In the present case, the Company duly provided advance notice on December 21, 1981 that it was studying the subcontracting of janitorial work.

The Union in turn challenged the decision at a meeting with the Employer on December 10, 1981, asserting that the subcontracting would violate the existing labor agreement. The parties met on January 14 and 15, 1982 and negotiated a number of mid contract concessions which were subsequently rejected by the union membership on January 30, 1982.

The issue, therefore remained at impasse. The net effect of this failed attempt at negotiating to settlement was that the Company had satisfied its *Fibreboard* obligations and the Union retained its right to challenge the subcontracting decision in arbitration.

The Company now contends that, having satisfied its statutory duty to bargain, it was free to subcontract the janitorial work because nothing in the labor contract expressly *precludes* transferring work out of the bargaining unit without the Union's consent. In support of this position the Company argues that the correct legal reasoning on this proposition is stated in the line of cases extending from Wimberly v. Clark Controller Company, 364 F. 2d 225 (6th Cir. 1966), through UAW Local 577 v. Hamilton Beach Mfg. Co., 40 W.S. 2d 270, 162 N.W. 2d 16 (1968) to Brown Co. v. NLRB, 663 F. 2d 1078, 109 LRRM 2663 (9th Cir. 1981).[1]

In 1979, however, the Ninth Circuit enforced the Board's determination that a transfer of work from one location to another for purposes of securing a lower wage cost constituted a mid-term modification in violation of Section 8(d) of the Act. Los Angeles Marine Hardware Co., 602 F. 2d 1302 (9th Cir. 1979). The National Labor Relations Board relied on the basic tenets of *Los Angeles Marine* in its subsequent decision in Milwaukee Spring Division of Illinois Coil Spring Co., 265 NLRB No. 28 (1982).[2]

In *Milwaukee Spring* the NLRB determined that:

> By unilaterally transferring work out of the bargaining unit during the term of a collective bargaining agreement for the purpose of achieving lower labor costs, an employer is guilty of modification of the

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[1] The Company also cites Co-Ed Garment Co., 231 NLRB 848 (1977); The Emporium, 221 NLRB, 1211 (1975); Hartman Luggage Co., 145 NLRB 1572 (1964) as precential Board rulings to the effect that no mid-term modification of contract resulted from the removal of bargaining unit work prompted by high labor costs.

[2] Volume 265 of NLRB reports not yet published.

agreement in violation of Section 8(d) of the National Labor Relations Act, (hereinafter called the 'Act') unless it can be shown that the agreement expressly or by clear implication permits such transfer without the union's consent.

### Competing Legal Arguments of the Parties

The legal and contractual arguments of the parties in the present dispute are thus joined. The Company's position is that the *Milwaukee Spring* proposition is erroneous and will be reversed by the federal courts.[3] In the alternative, even if *Milwaukee Spring* were valid law, the Agreement here under review expressly or implicitly permits the subcontracting of work without the Union's consent.

The Union's position is similarly two-fold: In the first instance, the *Milwaukee Spring* principle is not only valid but controlling, and second, the labor contract expressly prohibits the subcontracting herein grieved.

### Legal and Contractual Analysis

Arbitrators are understandably reluctant to construe external law, fearing to trespass on the special competencies of the board and the reviewing courts. Inasmuch as labor contracts are to be arbitrated "in the light of the law," however, there are occasions where the arbitrator has no choice but to look to external law on point. This dispute presents such occasion. Indeed, the labor contract requires that the present subcontracting dispute be governed by the parties' legal rights in effect prior to the execution of the Agreement.

Fortunately, the arbitrator's legal analysis in this matter reduces to merely reciting rather than construing applicable law, except for a brief commentary on the *Brown*

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[3] *Milwaukee Spring* is now on appeal to the Seventh Circuit, designated as *Milwaukee Spring Division of Illinois Coil Spring Company v. NLRB*, No. 82-2736. The briefs have been filed and oral argument was held on February 23, 1983.

decision. The facts which distinguish the *Brown* case from *Milwaukee Spring* center on the grounds upon which the Court declined to affirm the *Brown Co.* Board determination. The Board found the employer had transferred work out of a bargaining unit for the sole purpose of escaping its contractual wage obligations, without consent of the employees, thus violating Section 8(a)(1) and (3) of the Act.

The Ninth Circuit set aside the *Brown* Board's determination on the specific ground that:

> "The basic flaw in the Board's analysis is its conclusion that the legality of the respondent's actions did not require an interpretation of the contract. To the contrary . . . the threshold question (is) one involving contract interpretation."
>
> ". . . the initial determination must be whether the respondent was given the right under the collective bargaining agreement to transfer the . . . work . . . for the purpose of paying a lower wage scale . . . (I1) respondent's actions were permitted under the contract, then the respondent's actions would also have been lawful under the Act."

Whereupon the court remanded the case to the Board, leaving the determination on remanding to a "newly-composed" arbitration committee to the Board's discretion. By contrast, *Milwaukee Spring* specifically recognized the contractual issue in stating that the transfer of work out of a bargaining unit during the term of a collective bargaining agreement for purpose of achieving lower labor costs is prohibited ". . . unless it can be shown that the agreement expressly or by clear implication permits such transfer without the union's consent."

In essence, therefore, the court's decision in *Brown*, and the later determination of the board in *Milwaukee Spring* are not in conflict. The former stands for the proposition that the threshold question requires a contractual test, and the latter agrees that no violation occurs where it can be shown that the agreement permits such transfer without union consent.

The consequential point is that the line of tribunal law and court decisions reaching from *Los Angeles Marine* through *Milwaukee Spring* constitutes the "legal rights in effect prior to the execution of this Agreement" which the parties agreed would be dispositive of their subcontracting disputes. The *Brown* decision does nothing to disrupt the principles set forth in that lineage from *Los Angeles Marine* through to *Milwaukee Spring* but merely insists that the issue be first arbitrated to determine whether the labor contract satisfies the statute by some express or implied union consent to a particular subcontracting action. That, of course, is a major question in these arbitral proceedings.

In the present dispute, the Company argues that the *Milwaukee Spring* test ought not be applied because it is an invalid legal construction which will be reversed by the federal courts. The arbitrator, however, lacks authority to consider this argument. Only the reviewing court has the power to rule on the question. Unless and until the court of competent jurisdiction so rules, *Milwaukee Spring* represents the definitive statement of law which the parties agreed would govern their subcontracting dispute.

The sole question properly before the arbitrator, according to the *Brown* decision is whether the controlling Agreement permits the transfer of work out of the unit without express or implied union consent. The present Agreement contains no provision which can be read to express or imply permission to subcontract the janitorial work in question.

The Company correctly argues that the arbitrator has no contractual authority to apply the "balancing test" commonly relied upon when a labor contract is silent on the subject of subcontracting, except for incidental mention of jurisdiction in the Recognition and Wage Schedule clauses. The present Agreement invites no review under standard arbitral tests of the "reasonableness" of the subcontracting. The specific subcontracting provision, Article V, expressly reserves the determination to rights established by law, rather than by contract.

This fact brings the matter squarely back to the limitations on transfer of work out of a bargaining unit expressed in *Milwaukee Spring*. That most recent decision defines the subcontracting of bargaining unit work, for the sole purpose of securing lower labor costs, as a prohibited mid term modification of a collective bargaining agreement in order to escape its wage obligations.

Presumably, *Milwaukee Spring* leave intact, by its silence, the other arbitral tests commonly relied upon in subcontracting disputes, e.g., availability of special skills, tools and equipment within the bargaining unit at the work site. None of these traditional standards of interpretation are applicable to this present dispute, however. The necessary conclusion under the *Milwaukee Spring* limitations, accordingly, is that the subcontracting of the janitorial work here in dispute constitutes a prohibited mid term modification of contract.

## Discussion of Remedy

Historically, no area of dispute has posed more difficult problems of remedy than those involving the transfer of work out of a bargaining unit.[4] Hill and Sinicropi, while noting the broad remedial powers of the arbitrator, aptly observe that:

> "Unless there is clearly restrictive language withdrawing the subject matter or a particular remedy from this jurisdiction of the arbitrator, courts will generally hold that the arbitrator possesses the power to make the award and fashion a remedy even if the agreement is silent on the issue of remedial authority. This is not to say that any remedy the arbitrator formulates will pass muster by the courts."[5]

In the present case, the Agreement does, in fact, contain specific language limiting the arbitrator's remedial

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[4] Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the Thirty Second Meeting, National Academy of Arbitrators, BNA Books, 1980, pp. 125-166.

[5] *Remedies in Arbitration*, The Bureau of National Affairs, 1981.

authority. Article XIII, Section 5 provides that: "The arbitrator shall have no authority to impose liability on the Company arising out of facts occurring before the effective date or after the termination of this Agreement." Significantly, the parties negotiated different subcontracting language which became applicable upon the termination of the contract period during which the present dispute arose.

The instant grievance is governed by the terms of contract in effect at the time the subcontracting occurred. I have no more authority to carry forward the terms of the predecessor Agreement past its date of termination so as to govern the Company's present subcontracting authority than I would to retroactively impose the current language on the facts occurring under the predecessor agreement.

Neither can I credit the Union's argument that the current subcontracting language should be disregarded because the Union president understood the Company's chief negotiator to say during bargaining that it "had no effect on, would not affect the grievance . . . and the arbitration that we had pending." While the Company never refuted this testimony, neither does its chief negotiator agree with the inferences drawn by the Union and denied that any waiver of the current language was ever suggested.

The balance of the Union president's testimony adds to the ambiguity of this conversation: "(The Company negotiator) said all this did was affirmed what they had in the prior agreements and it would reflect that recent Board ruling . . ." (Tr. 53). I frankly do not understand the full impact of this statement on the issue here in arbitration, which leads me to rely on the parol evidence rule.

As the parties well know, that rule holds that oral statements, particularly those subject to ambiguity, cannot serve to vary or to set aside the terms of a clear writing. In sum, new contract terms are in place and, absent a clear and unmistakeable waiver, I am constrained to hold

that they have full force and effect for the time period they cover.

It remains, therefore, to affirm the arbitrator's authority for the period from the initiation of the prohibited subcontracting through to the date when different terms came to govern the issue. That period ran from February 15, 1982 until October 1, 1982.

## THE SPECIFIC REMEDY

The Company cannot be directed as of this date to discontinue the subject contracting. To do so would impose liability for actions taking place after the expiration of the contract language prohibiting the mid-term modification of contract. The effects of the improper subcontracting on employees affected and on the Union for the period falling within the arbitrator's reach, however, is subject to the following appropriate remedy:

## AWARD

1. The two senior employees who were on lay-off status during the period February 15 through October 1, 1982 shall be made whole for loss of earnings.
2. The make whole rate of pay shall be at the wage rate each would otherwise have received but for the "ripple effect" of said improper removal of work from the bargaining unit.
3. The Union shall be made whole for lost dues incurred as a result of the improper subcontracting.
4. The arbitrator agrees to retain jurisdiction for the purpose of resolving only such collateral issues that might arise under this Award as to identities and amounts owing to any individual.

Date 5/25/83

/s/ JOHN J. FLAGLER
Arbitrator

AGREEMENT

Between

JONES DAIRY FARM

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, SUCCESSOR BY MERGER TO THE AMALGAMATED MEAT CUTTERS AND BUTCHERS WORKMEN OF NORTH AMERICA, AFFILIATED WITH THE AFL-CIO, AND ITS LOCAL No. P-1236

October 1, 1979 to October 1, 1982

* * *

## ARTICLE XIII—ADJUSTMENT OF GRIEVANCES

(Refer to Exhibit "B", for adjustment of grievances pertaining to work measurement standards.)

1. A Grievance Committee of employee representatives, not to exceed five (5) in number, shall be designated by the Union.

2. For the purpose of this Agreement, the term "grievance" shall mean any claim against the Company by the Union or an employee pertaining to this Agreement or incident to the employment relations.

3. Grievances shall be handled through the following successive steps:

Step 1. Grievances shall initially be presented to the foreman by the aggrieved employee (or the Union) with his Union Steward present if requested by either the aggrieved employee or the foreman. Any grievance not so presented within thirty (30) calendar days from the date the employee first becomes aware of the alleged cause for complaint will be barred. The aggrieved party must tell the foreman any discussion is in the form of a griev-

ance and is being presented under Step 1. The foreman will designate the Company representative for Step 2 in the event the grievance is not settled in Step 1.

It is the declared policy of the Union that all grievances shall be settled wherever possible by the department steward in the First Step. However, this shall not prevent the department steward, if he deems it necessary, from obtaining assistance in this step from one employee member of the Union.

Step 2. If any grievance is not settled in Step 1, within five (5) work days, a member of the Grievance Committee shall investigate the grievance, review the facts and attempt adjustment with the designated Company representative. If not satisfactorily adjusted the Union may bring it to the third step promptly.

Step 3. A grievance not settled in Step 2 shall be reduced to writing and submitted to a meeting of a Management Committee and the Grievance Committee of the Union who shall settle the issue as promptly as possible. At this step a representative of the Union's International Organization may participate. If the grievance is not settled, the Company shall submit its answer in writing to the Union within ten (10) calendar days of this meeting.

Step 4. A grievance not settled in Step 3 may be submitted to arbitration within ten (10) calendar days after receiving the Company's written Step 3 answer.

(Note:) The Company and the Union shall have the right to call witnesses to any step in the grievance procedure.

4. If a grievance is submitted to arbitration, the Company and the Union shall jointly request the Federal Mediation and Conciliation Service to submit the names of 7 arbitrators who must be members of the National Academy of Arbitrators. The Company and Union shall each have the right alternately to strike 3 names, and the remaining person shall be the mutually accepted arbitrator. On the first arbitration, the Union shall strike first, and on subsequent arbitrations, the first strike shall

be alternated. Unless the parties agree otherwise in writing, no more than three grievances may be submitted to a single arbitration.

5. The sole function of the arbitrator shall be to determine whether or not the rights of an employee, as set forth in this Agreement, have been violated by the Company. The arbitrator shall have no authority to add to, subtract from, or modify this Agreement in any way. The arbitrator shall have no authority to impose liability upon the Company arising out of facts occurring before the effective date or after the termination of this Agreement.

6. All arbitration proceedings shall be held at such place as shall be mutually agreed upon between the Company and the Union.

7. All expenses incurred in connection with the arbitration proceedings shall be borne equally between the Company and the Union. If either party desires a transcript of testimony to be prepared for the arbitrator, such party will pay the cost of such transcript unless the other party desires a copy for its use, in which case the cost of the transcript for the arbitrator will be shared.

8. If a settlement is reached in any step of the grievance procedure, it shall be final and binding upon all parties.

9. The present policy of holding meetings between the Company and Grievance Committee every three (3) weeks will continue; however, if requested and agreed upon, any weekly meetings will be held after working hours.

10. Steps 1 and 2 of the grievance procedure are to be conducted during working hours, excluding breaks, and away from the work area (line or station) unless requested otherwise by the employee or Steward. Grievance steps (meetings) will be scheduled at the convenience of the Company, and grievance meetings so scheduled as in the past will not be on Company time (grievance time not paid for by the Company).

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